No. 12,152

IN THE

United States Court of Appeals

For the Ninth Circuit

WALTER A. SHAYLOR and
GLADYS SHAYLOR,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANTS' CLOSING BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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APPELLANTS' CLOSING BRIEF.

I. IT IS ERROR TO CONSIDER INSURANCE ON BEHALF OF THE INJURED PLAINTIFF IN AN ACTION UNDER FEDERAL TORT CLAIM ACT IN ORDER TO SHOW AWARD OF DAMAGES ADEQUATE.

It is respectfully submitted that, just as before the trial court, the appellee is now seeking to bring this Appellate Court into the same error, viz: to consider the amount of insurance money paid by insurance carrier, in order to show that the judgment was adequate.

1. For example, on page eleven (11) of appellee's brief, in the first paragraph, appellee quotes partially from transcript, page 83, as follows:

> "It is the plaintiff's duty to put in the case to establish these matters. It seems to me that this

plaintiff destroys all the evidence now in regard to the bills."

It is respectfully submitted that appellee completely misleads the court, when it thus partially quotes from the transcript, for by doing so, it fails to show why the court said what he said at that time.

Pages 82-83, Transcript, reads:

"Mr. Gearhart. As I said at the beginning of this trial if the court finds for the plaintiff then I think the plaintiff would be entitled to the money she was out for hospitalization and doctors bills.

The Court. That is true, but right now I don't see any way to determine that from the record, they were testified to at one time as some $250.00. It seems to me that this exhibit (No. 7) showing the amount does not amount to any thing now. There is nothing to show that there is anything she is obligated for.

Mr. Gearhart. The doctor testified as to that amount.

The Court. She has just testified that he rendered bills for $140.00 and $110.50. If this fund paid this amount, or if it is paid by this group insurance, then, under the late decisions, I am under the impression now that I am not going to put the government in the position of paying the bills twice. *It is the plaintiff's duty to put in the case to establish these matters. It seems to me that this plaintiff destroys all the evidence now in regard to the bills."* (Italics ours.)

2. For a second example of attempting to mislead this Appellate Court, on page 9 of the appellee's brief, paragraph (a) appellee states the following:

Walter A. Shaylor testified (Tr. 92) he paid the difference between $150.00 and $211.75, although he previously stated he paid $211.85. (Tr. 72.)

Here again it is respectfully submitted that appellee completely misleads this court when it partially quotes or summarizes the evidence contained in the transcript.

On said page 92 of the transcript we find the following (cross-examination of Walter Shaylor):

"Q. Did the California Physicians Service pay that?

A. I heard you say that."

All this cross examination of Walter Shaylor, plaintiff, occurred after the trial court permitted the appellee to put in evidence the fact that the plaintiffs had received compensation, partially, from insurance which they carried.

It is respectfully submitted that appellee has not only completely failed to answer the first point, or argument, page 11 of appellants' opening brief, to the effect that the trial court erred in admitting evidence of any insurance in behalf of the injured person to mitigate damages, but that it is attempting, by quoting partially from the transcript, to lead this Honorable Court into the same error.

3. For a third example of misleading this Appellate Court, on page 7 of the appellee's brief, top line, it is stated that "the testimony of Dr. Sullivan" (who was plaintiff's family physician and expert witness), "support the Court's findings that there was no permanent injury and that the pain and suffering

were very slight and that the award of $1000 was adequate."

As to permanent injury, Dr. Sullivan testified on direct (Tr. 38-39):

> "Q. Considering your education, experience and the history of this case could you express an opinion as to whether there is a permanent injury to Gladys Shaylor with reference to her pelvis, her symphysis pubis?
>
> A. From the separation which I have explained as shown in the films, this has given rise to some instability in the pelvic ring which accounts for the pain, on any jarring motion, through the lower extremities, any turn of the body will produce pain in the neighborhood of the symphysis pubis, in what should be a solid joint.
>
> Q. Could you state that would be permanent?
>
> A. Because of the lapse of time since the date of the injury and the improvement noted, I would say the condition today in relation to the pelvis is permanent, that is, as to the symphysis pubis."

On page 53 of the transcript, foot of page, the following occurred (cross-examination of Dr. Sullivan):

> "Q. The patient Gladys Shaylor, when was she last examined by you for a determination of her present condition so far as this phase of the injury is concerned?
>
> A. Interpretation made as to the history and effects of the injuries in December. She has been examined this year also, not with additional x-ray but she has been examined. I feel that it is permanent in that respect.

Q. You state in your opinion this has permanently affected the plaintiff?

A. Yes, sir."

As to pain and suffering, two years after injury, see page 63 Transcript (testimony of Gladys Shaylor):

"Q. Did the doctor prescribe or did you receive any special appliance to wear before you left the hospital?

A. I was fitted for a Kamp surgical belt. I was fitted for that before I left the hospital and when I got up I had to put that on; if I didn't, I got a severe pain and had a severe pain until I did put it on.

Q. How long have you been wearing that, or how long did you wear it?

A. Continuously since.

Q. Have you attempted to go without it, say, in the mornings?

A. Yes, I have gone a few mornings without it.

Q. Has that been lately?

A. Yes, recently on Saturday when I get up and am not going anywhere sometimes I don't put it on and then I start getting pain and have to go and put it on.

Q. When was the last time you tried that?

A. Last Saturday.

Q. Will you tell the Court whether you have any pain and suffering at this time?

A. Yes, sir, I do have pain down in the pelvis."

4. For a fourth example of misleading this Appellate Court, on page 9, foot of the page, the appellee's brief contains the bald statement as follows:

> "There is no showing whatsoever as to the reasonable value of the hospital service as related to this case."

On page 72 of the transcript, Walter A. Shaylor testified that the hospital bill of $211.85, "has been paid by me."

It is the law that amounts paid on account of medical treatment and attention is some evidence of reasonable value thereof; in the absence of showing to the contrary such evidence must be held to be sufficient.

Dewhirst v. Leopold, 194 Cal. 424.

In *Dewhirst v. Leopold,* supra, syllabus No. 8 reads:

> "In such action, the amounts paid on account of medical treatment and attention is some evidence of reasonable value thereof, and there being no showing to the contrary, such evidence must be held to be sufficient."

It is respectfully submitted that the testimony of Walter Shaylor is evidence of reasonable value in the absence of showing to contrary and that there is absolutely no showing to the contrary in the record, except evidence by way of payments by insurance company, brought out on cross examination.

5. As a fifth example of an attempt to mislead this Appellate Court, on pages 10 and 11 of appellee's brief is a statement "that there is a considerable overlap in charges made for treatment of the alleged injuries of the accident and treatments for the glandular deficiencies, gall bladder, menstrual and bowel trouble," without any reference to any part of the

transcript, in connection with Dr. Sullivan's charge of $600.50.

The best answer to this misleading and untrue statement is the contents of exhibit 7 for appellants which is quoted on page 10 of appellee's brief.

Furthermore, we find in the transcript on page 41, the following (testimony of Dr. Sullivan):

"Q. Doctor, did you prepare that? (referring to exhibit 7.)

A. This is prepared in my office by my secretary, it is for emergency treatment, treatment for shock at the emergency hospital, treatment at St. Mary's hospital, care and attention 3/5/46 to and including 3/22/46. Orthopedic management; fractured pelvis, right shoulder injury, right leg and right leg injury; genitor urinary treatment and investigation neuro-surgical management, and hospital calls. There are three items in 1946, 1947 and 1948 arising directly out of the injury sustained in addition to charges for certain medical transcripts requested of me in this case.

* * * * * * *

The Court. Is that the charge you made to her?

A. Yes sir, these charges. (indicating.)

The Court. That is what she owes you?

A. Yes sir, and as noted here, medical reports requested and testimony in Court.

The Court. Exhibit 7 may be admitted."

Furthermore, page 40 of the transcript (testimony of Dr. Sullivan):

"A. I think this is a reasonable charge and this is based on the Industrial Accident Commission fee schedule."

In this connection, it is the law that it is the accident or hazard acting upon the particular person, in her condition of health or body and not what the accident or hazard would be if acting on a normal or healthy person. In other words, whatever predisposing physical condition may exist in the particular person, if the accident or hazard is the immediate occasion of the injury, the injury arises out of the accident or hazard because it develops within it.

G. L. Eastman Co. v. I. A. C., 186 Cal. 587, 597.

In other words, all the matters quoted and discussed by appellee on pages four to six of their brief, as to her previous physical condition, is no argument against her receiving any or a reasonable compensation for *injuries sustained through the negligence of appellee.*

It was recently held in *Shurman v. Fresno Ice Rink,* 205 Pac. (2d) 77 (Cal. App. (2d)) that the trial court was justified in granting a new trial where the special damages were $572.10 and there were serious injuries and the jury verdict was only $800.00, and the Appellate Court of California held that a mere recitation of plaintiff's injuries suffered, when considered with the amount of special damages, clearly indicated that the trial court was justified in granting a new trial on the grounds that the amount allowed by the jury was inadequate.

II. THE DECISION OF THE TRIAL COURT AS TO GENERAL DAMAGES, FIRST AWARDING ONLY $500 AND ON MOTION FOR NEW TRIAL, RAISING IT TO $1000, IS NOT SUPPORTED BY THE EVIDENCE AND IS CONTRARY TO LAW.

It is further respectfully submitted that the appellee fails to answer the second point or argument, page 13 of appellants' opening brief, to the effect that the decision of the trial court as to general damages is not supported by the evidence and is contrary to law, except that on pages 4 to 6 of their brief, it attempts to justify the amount of the judgment because plaintiff Gladys Shaylor had previously had some gall bladder trouble, an appendectomy and had fallen on her buttock, all of which her family physician had testified to and had stated had no relation to this injury.

At foot of page 35, transcript, we find the following:

"Q. Doctor (Sullivan), in view of your education training and experience and the history of this case, could you express an opinion as to whether there is any relationship between the gall bladder trouble and the injury she sustained and suffered on March 5, 1946?

A. There has been no trauma to the area of the gall bladder. The gall bladder is not involved in this condition, as such.

Q. There is no logical relationship between this gall bladder trouble and the injury of March 5, 1946?

A. No."

Further, page 50, transcript, we find the following:

"The Court. Would that healing increase as time goes on?

A. It may improve if the patient was an athletic individual of normal weight and in the proper age group, but this patient being moderately obese, her weight would tend to aggravate the separation."

III. IT IS WELL ESTABLISHED LAW IN CALIFORNIA THAT WHERE IT CLEARLY APPEARS FROM THE EVIDENCE THAT A JUDGMENT IS WHOLLY INADEQUATE IN AMOUNT, A REFUSAL BY THE TRIAL COURT TO GRANT A NEW TRIAL FOR THAT REASON FURNISHES AMPLE GROUND FOR A REVERSAL OF THE JUDGMENT.

Price v. McComish, 22 C. A. (2d) 92, 95;
Torr v. United Railroads, 187 Cal. 505.

In *Price v. McComish,* supra, it was held that a judgment in plaintiff's favor for $200 was inadequate, where the uncontradicted evidence showed that the actual expenses of hospitalization, doctor's and nurse's services and necessary incidentals, for which plaintiff expended money, amounted to more than three times the amount of the judgment, without taking into account compensation that should have been awarded by reason of other damages that were occasioned to plaintiff.

Applying this rule, the uncontradicted evidence in the case at bar showed that the actual special damages, or expenses of plaintiffs for doctors, hospital, and incidentals, were more than twice the amount of the judgment as to special damages, and for this reason, alone, the refusal of the trial court to grant a new trial, furnishes ample ground for a reversal of the judgment as to damages.

IN CONCLUSION,—ACTS SPEAK LOUDER THAN WORDS.

Finally, there is uncontradicted evidence in the record that plaintiffs suffered the following special damages:

St. Mary's Hospital	$ 211.85 (Tr. 70)
Dr. John Robert Sullivan ..	600.50 (Tr. 40)
Dr. August Spitalny	25.00 (Tr. 73)
Dr. Frank W. Lusignan ...	20.00 (Tr. 73)
Medicine	20.00 (Tr. 74)
Sickleave, lost 28 days	187.38 (Tr. 70)
Total	$1064.73

With this uncontradicted evidence, except for appellee's cross-examination as to payments by insurance carrier of plaintiffs, the trial court fixed the special damages at only $460.25, and $1000 general damages.

It is respectfully submitted that acts speak louder than words and that therefore it is impossible to find from the record how the Court arrived at such a small award of special damages, except that it considered insurance payments; that appellee has not shown from the record how the trial court arrived at the small award of special damages; and that therefore the small award of damages was and is *"plainly erroneous"*.

Dated, San Francisco, California,
June 10, 1949.

Respectfully submitted,
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